FILE COPY.

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 240.

Office Supreme Court, U. S.
FILED.
FEB 28 1907
JAMES H. McKENNEY,
T. SHERMAN, AS CLERK.

WINTHROP ASTOR CHANLER, THOMAS COMMITTEE FOR JOHN ARMSTRONG CHANLER ET AL.,
Plaintiffs in Error,

vs.

OTTO KELSEY, COMPTROLLER OF THE STATE OF NEW YORK,
Defendant in Error.

ERROR TO THE SURROGATE'S COURT OF NEW YORK COUNTY IN THE STATE OF NEW YORK.

BRIEF FOR PLAINTIFFS IN ERROR.

LUCIUS H. BEERS,
Counsel for Plaintiffs in Error.

EVENING POST JOB PRINTING OFFICE, NEW YORK.

EVENING POST JOB PRINTING OFFICE, NEW YORK

Supreme Court of the United States.

WINTHROP ASTOR CHANLER, THOMAS T. SHERMAN, as Committee for John Armstrong Chanler, *et al.*,
Plaintiffs in Error,

vs.

OTTO KELSEY, Comptroller of the State of New York,
Defendant in Error.

October Term, 1906.
No. 240.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement of Facts.

This case arises on writ of error to the Surrogate's Court (p. 123) of the County of New York, State of New York, to review a determination of the Court of Appeals of that State sustaining an order of the Surrogate's Court imposing a "transfer tax" on certain remainders appointed to the plaintiffs in error by Laura Astor Delano, deceased.

The facts are undisputed.

These remainders were created and appointed as follows:

William B. Astor, on the occasion of the marriage of his daughter, Laura, to Franklin H. Delano, in the year 1844, executed a *deed* in the nature of a marriage settlement (pp. 89 to 92), conveying

certain real property, now valued at $1,827,450 (pp. 11 to 16), and certain personal property, now valued at $143,169.46 (pp. 18 and 19), to trustees, in trust, to pay the income to his daughter Laura for life, and granting the remainder to her issue in fee, or in default of issue to her heirs in fee, but giving to his daughter power, in her discretion, to appoint the remainder "amongst her said issue or "heirs, in such manner and proportions as she may "appoint by instrument in its nature testamentary, "to be acknowledged by her as a deed and in the "presence of two witnesses or published by her as "a will" (p. 91).

In the year 1848, and again in 1849, and again in 1865, William B. Astor made other deeds by way of addition to the original marriage settlement, all substantially similar in their terms (pp. 84, 87 and 93). All of these deeds were absolute and irrevocable, taking effect on delivery and not made in contemplation of the death of the grantor, nor made to take effect at his death. William B. Astor, in fact, lived until November 24, 1875 (p. 68).

Mrs. Laura Astor Delano died June 15, 1902, in Geneva, Switzerland (p. 48). She was not a resident of the State of New York (pp. 71 and 83); she left no descendants (p. 69).

Previous to her death she had executed an instrument (pp. 75 to 80) which has generally been referred to in the record as her "will." It was in part a will disposing of property of which she died seized or possessed (p. 79), and it was also in part an Instrument of Appointment exercising the powers granted to her by the *deeds* above referred to, and also exercising certain powers given to her by the will of her father, William B. Astor.

The codicil (pp. 80 to 82) was an alteration of the will and related only to property owned by Mrs. Delano. It did not affect the appointments.

A transfer tax was paid to the State of New York without objection on such property, real and personal, within the State, as was owned by Mrs. Delano at her death; also on such property as was appointed by her under powers created by the *will* of her father, William B. Astor. But, in addition to this, the defendant in error claimed that a "transfer tax" had also been imposed on the property appointed by Mrs. Delano under the powers created by the *deeds* above referred to.

The statute purporting to impose such tax was an amendment passed in 1897 (Chap. 284, Laws 1897) to the General Transfer Tax Law of the State of New York. For brevity that statute will be referred to as the Amendment of 1897. It is now sub-division 5 of Section 220 of the General Tax Law of the State of New York. It provided as follows:

> "Whenever any person or corporation shall "exercise a power of appointment derived "from any disposition of property made "either before or after the passage of this "act, such appointment when made shall be "deemed a transfer taxable under the pro- "visions of this act in the same manner as "though the property to which such appoint- "ment relates belonged absolutely to the "donee of such power and had been be- "queathed or devised by such donee by will; "and whenever any person or corporation "possessing such a power of appointment so "derived shall omit or fail to exercise the "same within the time provided therefor, in "whole or in part, a transfer taxable under "the provisions of this act shall be deemed to "take place to the extent of such omissions "or failure, in the same manner as though "the persons or corporations thereby becom- "ing entitled to the possession or enjoyment "of the property to which such power related "had succeeded thereto by a will of the donee "of the power failing to exercise such power, "taking effect at the time of such omission "or failure."

Under the practice, which has for some years prevailed in Surrogates' Courts in the State of New York, the transfer tax on appointed property is required to be adjusted in connection with the adjustment of the tax on property passing by the will. It was therefore necessary to raise all questions connected with the tax in the proceeding brought by Mrs. Delano's executors to have the tax adjusted on the property of which she was seized or possessed.

Among those who were made parties to that proceeding to assess the tax was Arthur Astor Carey, one of the plaintiffs in error herein. He is a grandson of William B. Astor, and was the appointee to whom Mrs. Delano had appointed all of the property originally transferred by the deeds of 1848 and 1849.

As soon as he was served with process in that proceeding in the New York Surrogate's Court, he applied to that Court to have the proceeding dismissed as to him, on the ground that no tax could constitutionally be imposed under the Amendment of 1897 on a remainder appointed to him under the terms of a power created by *deed,* which was not made in contemplation of death, and which took effect before there was any succession tax in New York State.

The question being one of constitutional law, the Surrogate made a *pro forma* order, denying the application to dismiss, leaving it to the Appellate Courts to consider the constitutional questions involved.

Mr. Carey then appealed to the Appellate Division of the Supreme Court, First Department, and the five Justices of that Court decided unanimously against the constitutionality of the amendment if applied to this case (*Matter of Delano,* 82 App. Div., 147; Record, pp. 135 to 140), their decision being summed up as follows, "to uphold the "tax here sought to be imposed under the guise

"of taxing a right of succession, would, in fact, be "to sanction a tax upon property, and for that pur- "pose to give to the amendment of 1897 a retro- "active effect which would be violative of the Con- "stitution" (p. 139).

From that decision of the Appellate Division the State Comptroller appealed to the Court of Appeals, where, by a divided Court (five for reversal and two for affirmance) the decision of the Appellate Division was reversed and Mr. Carey's application to have the decision dismissed as to him was denied (pp. 130 to 134). (*Matter of Delano*, 176 N. Y., 486.)

The decision of the Court of Appeals on Mr. Carey's application was not final in such a sense as would permit it to be reviewed by this Court, but as it then became necessary to go on with the proceeding for the assessment of the tax Mr. Carey, together with all the other plaintiffs in error, raised in that main proceeding the same constitutional questions which had been considered by the New York courts on the appeals above referred to. And as those questions had been passed upon, so far as the New York courts were concerned, the subsequent decisions in the main proceeding were *pro forma*, and appeals were taken to the Appellate Division (105 App. Div., 642), and to the Court of Appeals (183 N. Y., 543), raising the same federal questions for the purpose of their being finally considered by this Court, and a final order on the last remittitur from the Court of Appeals was entered in the Surrogate's Court, New York County (p. 112).

The same constitutional questions are presented by the appointment under the powers created by the deed of 1865 as under the appointment under the powers created by the three earlier deeds; but certain questions of construction of the appoint-

ment have arisen which make it difficult to state briefly the legal effect of the appointment made under the power created by that deed, and in the interest of brevity reference is here made particularly to the deeds of 1844, 1848 and 1849.

The assignments of error now relied on by the plaintiffs in error (pp. 113 to 120) present the federal questions on which this litigation is based and which have been raised at every step as it has proceeded. Those questions were first raised when the defendant in error attempted to introduce evidence before the tax appraiser for the purpose of having a tax imposed on the property appointed under the powers created by the *deeds* (p. 51). They were again raised on appeal to the Surrogate (pp. 39 and 44), again on appeal to the Appellate Division (p. 4) and again on appeal to the Court of Apeals (p. 108).

The plaintiffs in error claim that the Amendment of 1897, as applied to this case, is unconstitutional, both under Section 10 of Article 1 and under the Fourteenth Amendment. But the objections they urge under each of those provisions are separate from and independent of the objections urged under the other provision.

Specification of Errors.

Briefly stated, the claims of the plaintiffs in error are:

That they rely for their title to these remainders on *deeds* made many years before there were any succession taxes in New York State, and do not rely on any "privilege" of making a "will" granted to Mrs. Delano by the State of New York. That the powers were created by contracts and that the right to exercise them in full and to have them exercised in full were contract rights not depending on any privilege granted by the State, and that

the Court of Appeals has therefore erred in refusing to hold that the Amendment of 1897 is unconstitutional and void as being repugnant to Section 10 of Article I of the Constitution of the United States in that it impairs the obligation of contracts made prior to the enactment of the Statute.

Also, that the remainders in question were not the property of Mrs. Delano, that she did not die seized or possessed of them, and that the instrument by which she appointed them, in so far as it exercised the powers, was not legally a "will," and that the Amendment of 1897 in enacting that such remainders should *"be deemed"* to be Mrs. Delano's property, when they were not her property, and should be taxed *"as though"* they had belonged to her, when they did not, in fact, belong to her, and as though they "had been bequeathed and devised "by her *by will,"* when they were not in fact devised or bequeathed by her by will, was a taking of the property of these plaintiffs in error without due process of law, and that the Court below erred in not holding the Amendment of 1897 to be unconstitutional and void under the XIV Amendment to the Constitution of the United States for that reason.

That no transfer of the remainders in question has been caused by the death of the owner of such remainders, and that the power of the State to impose a succession tax has not been called into being.

The amount of the tax on the property so appointed to the plaintiffs in error is upwards of $120,000 (pp. 32 to 37).

The case is unusual in its facts, for the trusts created in 1844 continued for fifty-eight years. This is probably one of the last survivals of a class of cases where powers of appointment were created by deed made usually by way of marriage settle-

ment and made before the Married Women's Acts were generally adopted in the United States. The case, nevertheless, presents an existing condition of law, and, therefore, it may properly claim the attention of this court if that law is not in accordance with the United States Constitution, for the Amendment of 1897 is now the law of the State of New York.

In the following points it has been necessary to refer with some repetition to the fact that there has been no succession caused by the *death* of the former *owner* of the property taken. This could not well be avoided, for the fact so stated constitutes the essential distinction between this case and the earlier cases where powers were created by *will* and where there was a succession caused by the death of the former owner of the property. The fact, therefore, is of primary importance in deciding what principles of law shall here be applied, and in discussing those principles it is necessary to look at it from various points of view.

FIRST POINT.

The power of the State to take property by means of a succession tax arises only when the succession is caused by the death of the former owner of the property taken.

I.

"DEATH IS THE GENERATING SOURCE FROM WHICH THE PARTICULAR TAXING POWER TAKES ITS BEING."

Knowlton v. *Moore*, 178 U. S., 41, 56.
Cahen v. *Brewster*, 203 U. S., 543, 550.

In New York the tax imposed by the Amendment of 1897 and under the statute which it amends is arbitrarily called a "Transfer Tax," but it is imposed only on that class of transfers which are caused by will, by the intestate law or by deed or gift, intended to take effect after death (Chapter 908, Laws 1896, Sec. 220). The "Transfer Tax" is, therefore, a succession tax; that is, an exercise by the State of its power over the disposition of the property of deceased persons.

Such taxes have been held to rest on the principles that the State possesses the ultimate control over property, the owner of which has died; that therefore the right to take by will or under the intestate laws is a privilege granted by the State, and that therefore it is competent for the State to revoke that privilege in part and retain a portion of the property of deceased persons in the form of a succession tax.

In *Mager* v. *Grima* (8 How., 490, 493), Mr. Chief Justice Taney, in discussing a State law imposing a succession tax, remarked:

> "Now the law in question is nothing more "than an exercise of the power which every "state and sovereignty possesses, of regulat- "ing the manner and term upon which prop- "erty real or personal within its dominion "may be transmitted by last will and testa- "ment, or by inheritance; . . . . And "if a State may deny the privilege altogether, "it follows that, when it grants it, it may "annex to the grant any conditions which it "supposes to be required by its interests or "policy. . . . ."

In *United States* v. *Perkins* (163 U. S., 625), Mr. Justice Brown discussed the history and nature of such taxes and remarked (p. 627) that:

> "While the laws of all civilized States "recognize in every citizen the abso- "lute right to his own earnings, and

> "to the enjoyment of his own property, "and the increase thereof, during his life, ex- "cept so far as the State may require him to "contribute his share for public expenses, "the right to dispose of his property by will "has always been considered purely a crea- "ture of statute and within legislative con- "trol" . . . . "the so-called inheritance "tax of the State of New York is in reality "a limitation upon the power of a testator to "bequeath his property to whom he "pleases;" . . . .

Again, in *Magoun* v. *Illinois Trust & S. Bank* (170 U. S., 283), Mr. Justice McKenna, in delivering the opinion of the Court, referred to the earlier decisions of this Court, and based his conclusions on the same principles.

Again, in *Knowlton v. Moore* (178 U. S., 41), Mr. Justice White, in delivering the opinion of this Court, discussed at length the history and essential character of inheritance and succession taxes, starting with the Roman law and the laws of the Continent of Europe, and tracing the subject in the laws of England and then in the laws passed by Congress and by our various State Legislatures. The conclusions reached from this study he stated thus (p. 56):

> ". . . . Although different modes of "assessing such duties prevail, and although "they have different accidental names, such "as probate duties, stamp duties, taxes on "the transaction or the act of passing of an "estate or a succession, legacy taxes, estate "taxes or privilege taxes, nevertheless tax "laws of this nature in all countries rest in "their essence upon the principle that *death "is the generating source from which "the particular taxing power takes its "being."* . . . .

(The italics above are our own but the sentence is so significant as to have been quoted with ap-

proval by Mr. Justice McKenna in *Cahen* v. *Brewster,* 203 U. S., 543, 550, as stating the essential basis of the tax.)

And again (p. 57):

> "Confusion of thought may arise unless it "be always remembered that, fundamentally "considered, it is the power to transmit or "the transmission or receipt of property by "death which is the subject levied upon by "all death duties. The qualification of such "taxes as privilege taxes, or describing them "as levied on a privilege, may also produce "misconception, unless the import of these "words be accurately understood." . . . .

The words last quoted point directly to the error complained of in this case, for the Court of Appeals has sustained this exaction on the theory that there was a "privilege," although these appointees do not rely for their title on the Statute of Wills or on the intestate laws, for there has been no succession caused by the death of a former owner of these remainders.

Again, in *Plummer* v. *Coler* (178 U. S., 115, 124), Mr. Justice Shiras, in delivering the opinion of this Court, quoted with approval from an opinion of Chief Judge Andrews of the New York Court of Appeals (rendered in *Matter of Sherman,* 153 N. Y., 1), as follows:

> ". . . . The so-called tax is an exac- "tion made by the State in the regulation of "the right of devolution of property of dece- "dents, which is created by law, and which "the law may restrain or regulate. Whatever "the form of the property, the right to suc- "ceed to it is created by law, and if the prop- "erty consists of government securities, the "transferee derives his right to take them as "he does his right to take any other property "of the decedent, under the laws of the State, "and the State by these statutes makes the "right subject to the burden imposed."

The New York Court of Appeals and the highest courts of other States have uniformly and repeatedly held to the same effect,

Matter of Swift, 137 N. Y., 77, 83.
Matter of Sherman, 153 N. Y., 1, 3, 4, 5.
Matter of Lansing, 182 N. Y., 238, 248.
Minot v. *Winthrop,* 162 Mass., 113.
Re Wilmerding, 117 Cal., 281.
State v. *Dalrymple,* 70 Md., 294.
State v. *Henderson,* 160 Mo., 190.
State v. *Alston,* 94 Tenn., 674.
Kochersperger v. *Drake,* 167 Ill., 122.
Strode v. *Commonwealth,* 52 Pa. St., 181.

It will appear from these authorities that in order to permit the imposition of a succession tax there must be a situation where the power of the State to regulate the succession to the property of a *deceased* person has been called into being by the *death* of the *owner* of the property.

No such situation has arisen in the history of the property appointed to the plaintiffs-in-error since the time when it belonged to their ancestor William B. Astor prior to the making of the first deed in 1844.

It follows as a corollary to the above that:

II.

THE VALIDITY OF A SUCCESSION TAX DEPENDS, NOT ON THE GENERAL TAXING POWER OF THE STATE, BUT ON THE EXISTENCE OF A POWER IN THE STATE TO REGULATE THE PARTICULAR SUCCESSION SOUGHT TO BE "TAXED."

In a series of decisions this Court and the New York Court of Appeals have held that this is not a tax on property, and this Court has cited, with approval, a decision of the Court of Appeals, holding that, "It is not a tax upon persons."

United States v. *Perkins,* 163 U. S., 625, 629.

United States v. *Perkins* presented a case where the State had no power to tax *the legatee,* for the legatee there was the United States, and in *Plummer* v. *Coler,* (178 U. S., 115), a case was presented where the State had no power to tax *the property* transferred, which, in that case, were United States Government bonds. Yet, in both cases, the imposition of a transfer tax was sustained by this Court, and in both cases where the State had no power to tax the person or the property the exaction was sustained not by reason of the State's power to impose a tax but by reason of the power of the State to regulate that particular succession to that particular property which had been left by the death of its owner.

This so-called "tax" in its essential character is, therefore, a part of the State's power to regulate succession to the property of a decedent rather than a part of the State tax laws; for the exaction has repeatedly been enforced as a condition to such succession where it could not have been enforced as a tax in the ordinary sense of that word.

Thus, Mr. Justice Brown, in delivering the opinion of the Court in *United States* v. *Perkins* (163 U. S., 625, 628), said:

> ". . . . we know of no legal principle to "prevent the legislature from taking away or "limiting the right of testamentary disposi- "tion or imposing such conditions upon its "exercise as it may deem conducive to pub- "lic good.
>
> "In this view, the so-called inheritance "tax of the State of New York is in real- "ity a limitation upon the power of a tes- "tator to bequeath his property to whom he "pleases;" . . . .

This holds that the "so-called inheritance tax" is essentially a partial repeal of the Statute of Wills and it was on that principle that it was held that New York State would take part of certain property bequeathed to the United States.

It is not necessary to decide now whether the modern State can, by repealing the Statute of Wills and the Intestate Laws, become the heir of every one. The State unquestionably has the power to create and to alter the privilege which it gives in the Statute of Wills and in the Intestate Laws, and it must follow that as a part of that power it can make it a condition to the privilege of succession that part of the property involved shall pass to the State.

So far as concerns the essential basis of this "tax," it makes little difference here whether this taking of part of the property by the State is a partial resumption of an ultimate right of ownership in all property which has been left by the decease of its former owner or is a charge exacted for availing of the privilege which the State has given in permitting that property to pass to devisees, legatees and next of kin. *In either case, the act of retention by the State of a part of the property is practically an amendment to the Statute of Wills*

and to the Intestate Laws. Or, as this principle was stated in *State* v. *Alston* (94 Tenn., 674, 681), ". . . . It is a retention by the State of a part of a deceased person's property which the State may take to meet its necessities, and which in "certain cases it may take *in toto,* as in the cases "of escheated property." . . . .

This obvious conclusion has an important bearing here, for from it it follows that the general power of the State to levy what may properly be called a "tax" cannot sustain the "tax" here and that to sustain the exaction sanctioned by the Court below, it must be shown that New York State had power to make this exaction by reason of its power to make and to alter the Statute of Wills so as to permit or to curtail *this particular appointment.*

But an examination of the facts of this case will show that the Statute of Wills and the Intestate Laws had nothing to do with the transfer of this particular property to these appointees, and that these appointees relied for their title not on those Statutes but on the terms of deeds made *inter vivos* and not conditioned to take effect on the death of the grantor. And that if there had been no Statute of Wills and no Intestate Laws in New York State when these deeds were made, or if those statutes had been revoked after the deeds were made, the appointees would still have taken title to their remainders by virtue of the force of the original deeds.

In the broadest sense, all laws requiring money to be paid to the Government for public purposes are a part of the system of taxation and such exactions may, perhaps, in such a broad and somewhat indiscriminating sense be called "taxes." But that has never been allowed in this Court to complicate the questions which have arisen in reference to the validity of State inheritance tax statutes, and those statutes have been sustained where both the legatee and the property transferred were

not subject to the taxing power of the State. And this has been done by studying the essential nature of the tax and sustaining it as a part of the power of the State to regulate the particular succession then under consideration.

The plaintiffs in error ask that the same principles be applied to this case and ask the Court to apply here the same tests with respect to the power to regulate succession which have been held to be decisive in earlier cases which have called in question the validity of State inheritance tax statutes.

The *general taxing power* of governments may enable them to impose a tax on a succession, as on any other form of transfer, even where the succession may be under the laws of another jurisdiction; that is, the power to tax is not necessarily coterminus with the power to regulate the succession where the owner of property dies. (*Knowlton* v. *Moore,* 178 U. S., 41.) But in such a case there must be an exercise of the general taxing power of the government which imposes the tax, and that power must be exercised so as to conform with the constitutional limitations on the power.

Neither of these conditions are met in the present case, for here the Court of Appeals in its decision below has held that this was not an exercise of the general taxing power, and in the *Pell* case, where it discussed this particular subject at length, and where the case turned on these questions, it was held that in passing the Tranfer Tax Law and its amendments, New York State did not exercise its general taxing power, and that if it had intended to exercise that power the act would have been unconstitutional.

SECOND POINT.

The powers under which this property was appointed to the plaintiffs in error were created by deed *inter vivos* and that fact distinguishes this case from the case of Orr v. Gilman (183 U. S., 278), where the power was created by will.

It is important to observe that the property on which this tax was imposed below consisted wholly of remainders and of interests in personal property which were similar to remainders in land.

The entire property belonged to William B. Astor before the deeds of 1844, 1848 and 1849 were made. By those deeds he granted these remainders, not to his daughter, Mrs. Delano, but to a class of his descendants whom he designated and among whom she, as his agent, was given power to appoint the remainders.

The remainders were never her property, but, as agent of her father she designated the persons who were to take. That is, the grants evidenced by the deeds made in 1844, 1848 and 1849 were in a sense incomplete, and to meet this incompleteness the grantor provided that Mrs. Delano, as his agent, should designate those of a class of his descendants who should take the remainders. Her instrument of appointment was in law a part of a deed made between living persons, and not dependent for its effect in any way upon the death of the owner of the property.

It was as competent for William B. Astor to make one disposition of the life estate and another disposition of the remainder as for him to have divided a farm by a boundary fence and then dis-

posed of the easterly half in one manner and the westerly half in another. And the fact that the life estate in the lands and funds was given to Mrs. Delano has, as a matter of law, nothing to do with the questions presented with reference to these remainders.

In the case of *Orr* v. *Gilman*, 183 U. S., 278, this Court sustained the New York Court of Appeals in imposing a transfer tax on the transfer under an appointment under the Amendment of 1897. But in that case, as in almost all appointment cases, the power of appointment had been created by *will;* that is, the former *owner* of the property had *died* and the power was brought into being by his *death* and there was, in fact, a succession. That testamentary disposition was incomplete at the time when the will which created the power took effect, and it was *a part of that testamentary disposition* that the power of appointment should be afterward exercised. Whether it was then exercised by deed or by will was probably not important so far as its liability to a succession tax was concerned, for that exercise, however evidenced, was part of a succession caused by *death*, and the State had power to impose a tax at any time between the death of the original owner and the time when it ultimately vested in beneficial possession of the ultimate owner.

In *Orr* v. *Gilman*, this Court based its decision on this power of the State to impose a succession tax at any time during this period of administration, and cited in support of that view the earlier case of *Carpenter* v. *Pennsylvania* (17 How., 456), where a succession tax law had been passed after the death of the testator, but before the estate had been divided, and quoted from the opinion in the *Carpenter* case as follows (p. 285):

> ". . . . The rights of the donee are "subordinate to the conditions, formalities

> "and administrative control, prescribed by "the State in the interests of its public or- "der, and are only irrevocably established "upon its abdication of this control at the "period of distribution. If the State, during "this period of administration and control "by its tribunals and their appointees, thinks "fit to impose a tax upon the property, there "is no obstacle in the Constitution and laws "of the United States to prevent it."

Mr. Justice McKenna, in a recent succession tax case, discussed this subject and, after reviewing recent decisions, held:

> ". . . . There is nothing, therefore, "in those cases which restrains the power of "the State as to the time of the imposition of "the tax. It may select the moment of "death, or it may exercise its power during "any of the time it holds the property from "the legatee. . . . ."
>
> *Cahen* v. *Brewster*, 203 U. S., 543, 551.

This declares the precise distinction which is here contended for between this case and cases where powers are created by *will*; that is, that in such cases there is a *death* which calls into being the power of the State over the property of deceased persons and that that power, when so called into being, enables the State to impose a tax on the property at any time in the course of administration while it is passing through the legal machinery of succession provided by the State.

Here there has been no succession caused by the *death* of an *owner*.

Where powers have been created by *will* they originate on the *death* of the *owner*. There is in such cases, therefore, a succession and the State has power to impose a succession tax when the power is created or when it is exercised, or at any time before the property ultimately passes in

beneficial ownership and possession to the ultimate taker, for *the creation and exercise of the power are parts of one transfer* caused by, and originating in, the death of the former owner. This must follow from the principle that an instrument exercising the power is legally a part of the instrument which created the power.

> "An estate created by the execution of a "power, takes effect in the same manner as if "it had been created by the deed which raised "the power. The party who takes under the "execution of the power, takes under the au- "thority, and under the grantor of the power, "whether it applies to real or personal prop- "erty, in like manner as if the power, and the "instrument executing the power, had been "incorporated in one instrument."
>
> 4 *Kent's Commentaries,* 337.

See also:

> 2 *Wash. Real Property,* 320.
>
> *Emmons v. Shaw,* 171 Mass., 410 (and cases there cited).

In *Orr* v. *Gilman,* the instrument before the Court exercised powers created by will, and it was therefore legally a part of that will—a part of a succession caused by the death of the former owner. Here the instrument before the Court exercises powers created by deeds and is therefore legally a part of those deeds which were transfers *inter vivos.*

These distinctions between powers created by ancient deeds and powers created by wills go to the essential nature of the transaction involved in the creation and exercise of a power and to the essential nature of the State's power to tax.

The powers considered in *Orr v. Gilman* were created by the will of David Dows, Senior, whose will was admitted to probate in 1890, and the powers were exercised by his son in 1899. The partial testamentary disposition made in

1890 was not completed till 1899 or later, and from 1890 until some time after 1899, when the appointees went into possession, the property may be said to have been going through the legal machinery provided by the State for the disposition of property on the death of the owner. And the fact that the property necessarily went through that machinery gave the State the power to impose the succession tax for the privilege.

The State had power to impose that charge at any stage of the operation and to impose it more than once. It happened that there was an inheritance tax in New York before the first will took effect in 1890, but if there had not been the State would still have had the power to impose the tax at any time before the property passed beyond the machinery of succession.

Carpenter v. *Pennsylvania,* 17 How., 456.

Cahen v. *Brewster,* 203 U. S., 543.

In this case these remainders have not gone through this State machinery of succession. *If there had never been any statute of wills or any intestate laws in New York, these powers could have been created by deed, as they were, and exercised by instrument of appointment, as they were.*

The fact that the Instrument of Appointment (p. 75) executed by Mrs. Delano was for convenience connected with her will did not legally make it her will. This will be discussed in the Fifth Point.

If these deeds had been intended to take effect on the death of the grantor, a different question would be presented, for there would then have been a succession taking effect on the *death* of the former *owner.* But they were absolute transfers not in any way dependent for their effect on the death of the grantor. They were transfers *inter vivos* which took effect upon their delivery.

THIRD POINT.

The Amendment of 1897 was not an exercise of the State's general power to tax, but was intended to impose a succession tax.

The claim has heretofore been made in this Court that succession tax laws passed by States have violated the Fourteenth Amendment by providing for certain increases in the rate of taxation and certain exemptions and inequalities. But that claim has always been disposed of by pointing out that the exaction was *a succession tax*, and therefore that the power to impose it was a part of the State's power to regulate succession in case of death and was not subject to the limitations which exist in cases of an exercise of the State's general power of taxation, that is, the imposition of a tax on property or on persons. As was observed by Mr. Justice Brewer in a dissenting opinion in such a succession tax case (*Magoun* v. *Trust & Savings Bank*, 170 U. S., 283, 302):

> "It seems to be conceded that if this were "a tax upon property such increase in the "rate of taxation could not be sustained, but "being a tax upon the succession it is held "that a different rule prevails." . . . .

It is important to notice that this statement of Mr. Justice Brewer was made with reference to the absence of power in a State in the exercise of its general taxing power to pass a tax statute containing exemptions and inequalities; that is, it is to be regarded as a statement of the effect of the XIVth Amendment. The decision of this Court in *Knowlton* v. *Moore*, 178 U. S. 41, is, therefore, not contrary to this statement of the law. For, in the lat-

ter case, this Court was considering the act of Congress and was, therefore, considering not the XIVth Amendment but the constitutional limitations imposed on Congress.

But it is not necessary for the Court to consider here, whether the statute would be constitutional if it were regarded as an exercise of the general taxing power of the State, for the New York Court of Appeals has in this case held that the statute in question "does not attempt to impose a tax upon "property, but upon the exercise of the power of "appointment" (p. 131).

This is directly in line with the series of decisions by the New York Court of Appeals, and particularly with their decision in *Matter of Pell* (171 N. Y., 48), where this very question was under consideration.

On the general constitutional question the Court there held (p. 60):

> "This amendment is clearly unconstitu-
> "tional in another respect, as it does not ap-
> "portion the burden equally among the own-
> "ers of estates sought to be taxed, for it im-
> "poses on some five per cent, on others one
> "per cent, and as to others nothing at all."
> . . . .

The Court then went on to hold that the statute in question was not an exercise of the general power to tax, but imposed a succession tax, but that it impaired contracts and was therefore unconstitutional.

It does not appear clearly from the words above quoted whether the Court of Appeals was there referring to provisions of the Constitution of the United States or of the Constitution of the State of New York. The report of the case indicates that counsel for the appellant had invoked the provisions of both constitutions and the Court

of Appeals in an earlier case (*Stuart* v. *Palmer*, 74 N. Y., 183, 189) had held that where one person was required to pay more than his share of a tax the exaction "may properly be styled extortion or confiscation." A New York statute which imposed a tax on persons or on property with such discrimination would, therefore, probably come within the provisions of the New York Constitution, Art. I, Sec. 6, which provides that no person shall be deprived of "property without due process of law; nor shall private property be taken for public use without just compensation."

If, therefore, the decision of the Court of Appeals, above quoted, construes the New York Constitution, then it establishes finally, so far as that State is concerned, that a New York tax statute which does not apportion the burden equally among the owners of estates sought to be taxed is unconstitutional if regarded as an exercise of the general taxing power of the State. And, if this Court shall now hold that this tax cannot be upheld as a succession tax, it will follow that it cannot be upheld as an exercise of the State's general taxing power.

But the whole decision of the Court of Appeals in the *Pell* case makes it unnecessary to apply to the Transfer Tax Act the constitutional limitations which would be applicable to a statute which exercised the general taxing power of the State, for the Court of Appeals there reversed the Appellate Division on the express ground that the act could not be regarded as an exercise of the general taxing power.

The statute considered in the *Pell* case was an amendment passed in 1899 to the Transfer Tax law. It related to the imposition of a tax on estates in remainder, but in deciding as to the intention of the Legislature the Court of Appeals considered that amendment as a part of the general Transfer Tax Act which it was intended to amend, and the Court

reached its conclusion by construing the law as a whole. The decision in that case necessarily applies to the amendment of 1897, which was a part of the Transfer Tax law before the *Pell* case arose. The same view was again declared in this case (p. 131).

The issue in the present case is, therefore, narrowed down to the question whether the Amendment of 1897 can be upheld as a succession tax (*i. e.*, an exercise of the power of the State with respect to the disposition of property left by the death of its owner), for it must stand or fall as a succession tax.

FOURTH POINT.

There has been no succession to the remainders originally transferred by the deeds of 1844, 1848 and 1849 which would permit the imposition of a succession tax.

As already discussed, the only succession which can be the basis of a succession tax is that which is caused by the *death* of an *owner* of property. The death of William B. Astor in 1875 has nothing to do with the transfer of these remainders, for he had, thirty-five or more years before, conveyed the remainders by deed.

The death of Mrs. Delano cannot be the basis of a taxable succession, because she did not own the remainders.

After her death the remaindermen went into *possession*, but her death did not give them *title*. Possession is sometimes an incident to ownership, but title is ownership itself, and to treat Mrs. Delano's death as the basis of a taxable suc-

cession to these remainders is simply to disregard a fundamental distinction.

This distinction is well illustrated by *Matter of Seaman* (147 N. Y., 69). There the New York Transfer Tax Act had been passed after *title* had vested in certain remaindermen, but before the precedent life estate terminated, and therefore before they were entitled to *possession*. And it was held that no tax could be imposed.

The law with respect to the execution of powers is merely a branch of the law of principal and agent. The donee of the power may, to careless observers, appear to exercise some of the powers of disposition which the owner might exercise, but the donee of the power is not the owner, and to treat him as owner can only lead to confusion and complications.

Mrs. Delano's powers with respect to these remainders were strictly limited. If she had not exercised the powers, the remainders would have gone to her heirs, and the powers merely enabled her to appoint the remainders among those heirs. She could not have sold the remainders in her lifetime, and if she had died leaving debts her creditors could not have reached them. If she had exercised these powers by an instrument entirely separate from her will, the appointees would have held title precisely as they do to-day, and if the statute of wills and the statute of distributions had both been revoked before she died, these remainders would nevertheless have passed, under the original deeds, to the persons designated by her in an instrument executed according to the requirements of those original deeds.

Heath v. *Withington* (60 Mass., 497).

To treat these remainders as *practically* the property of Mrs. Delano is simply to depart from the legal principles which regulate the relations be-

tween principal and agent, and which preserve *ownership* in the principal while recognizing that the agent has the *powers* which have been conferred upon him.

There can be powers which make the property involved practically the property of the donee, but those must give the donee the unlimited power of appointment. Such powers the law treats as tantamount to ownership, at least so far as the rights of creditors are concerned.

Here the powers are in trust and were limited to be exercised only in favor of certain descendants of the creator of the power.

The distinctions here contended for have been recognized by the Court of Appeals in a recent case which has arisen under this Amendment of 1907.

Matter of Lansing, 182 N. Y., 238.

A testator, who died in 1869, had left a portion of his estate in trust for his daughter, Mrs. Lansing, with remainder to her heirs at law, but subject to a power which he gave to her to dispose of the remainder among her heirs or collateral relatives. Mrs. Lansing died, leaving as her only heir her daughter, Mrs. McVickar, and leaving a will by which she appears to have made certain devises or bequests, or both, to Mrs. McVickar, and by which she also appointed to Mrs. McVickar the same property which the latter would have taken under her grandfather's will if her mother had made no appointment.

The Court of Appeals, in holding that Mrs. McVickar might elect to take directly under her grandfather's will, and not by appointment, discussed the appointment as follows:

> "Mrs. McVickar, by accepting under her "mother's will property which belonged to

> "her mother at the time of her death, did not "accept the title tendered by the appoint- "ment, although both gift and appointment "were made by the same instrument. She "could claim as the devisee of her mother "and disclaim as her appointee, because *a "gift and an appointment are wholly unlike "in character and substance. The gift was "confined to property of the mother, while "the appointment was confined to property "which she never owned* and which vested in "the daughter through the will of her grand- "father." (Italics ours.)
>
> *Matter of Lansing*, 182 N. Y., 238, 245.

A practical example of the impropriety of treating those remainders as though they had belonged to Mrs. Delano and as though they had been devised or bequeathed by her, will appear by the amount of the tax assessed below.

For many years there was in New York State no succession tax on direct descendants, and when a tax was imposed on them it was, and now is, at the lowest rate (1 per cent.), while the tax on devises and bequests to collaterals is at the highest rate (5 per cent.).

The plaintiffs in error are all direct descendants of William B. Astor. They belong to the class to whom he intended the remainders created by the deeds should ultimately pass, and legally they take their estates from him as though the appointment were a part of the original deed (4 Kent's Com., 337).

But Mrs. Delano, the agent of William B. Astor, is a collateral relative of all the plaintiffs in error, and this device of treating the remainders "as though" they belonged to her not only subjects the remainders to a succession tax, but to a tax at the highest rate, as though the former owner of the remainders had been a collateral relative, although in fact he was a direct ancestor.

FIFTH POINT.

The instrument by which Mrs. Delano exercised these powers of appointment created by deed was not a "will" in so far as it exercised those powers.

I.

THE FORM OF THE INSTRUMENT.

The instrument by which Mrs. Delano exercised these powers is distinctly and formally subdivided. By the first and second articles she appoints these remainders which did not belong to her, but which as the agent of her father she had power to appoint (pp. 75 to 78). By the third and fourth articles she devises and bequeathes her own property (pp. 78 to 80). The latter articles legally constitute her *will*. The codicil (pp. 80 to 82) provides that in case certain appointments proved invalid the amount intended to be appointed should be made up out of her individual estate. Its only function, therefore, is to dispose of her individual property, and it is legally only a codicil to her "Will" and does not affect the appointments.

To speak accurately and legally, the combined instrument, which has been called a "Will" below, should be called an "Instrument of Appointment *and* Will," and Mrs. Delano in the caption of the instrument (p. 75) refers to its dual nature, and to the creation of the powers, and in the body of the instrument she makes a careful and formal distinction between the two parts of the instrument. For the sake of brevity, it has sometimes been called a "will."

A more unfortunate place for abbreviation could hardly be found. The portion of the instrument which was a will was the act of an *owner* and disposed of property which Mrs. Delano *had owned,* and which, on her death, must necessarily pass through that legal machinery which the State had provided for regulating succession to property where its *owner* has *died.*

On the other hand, the portion of the instrument which exercised these powers was the act of an *agent,* and, under a delegated power, it appointed property which she did not own and which was beyond the reach of the power which the State has to regulate the disposition of property left by the death of its former *owner.* In one case the power of the State to impose a succession tax had been called into being; in the other case it had not. In one case Mrs. Delano was availing herself of a privilege granted by the State; in the other she was exercising a contract right.

This Court has held that this tax "is in reality "a limitation upon the power of a testator to be-"queath his property to whom he pleases" *(U. S.* v. *Perkins,* 163 U. S., 625, 628). How can such limitation affect the *appointment* of these remainders? Mrs. Delano in appointing them was not bequeathing or devising anything and the property appointed was not her property.

To disregard these distinctions and to treat the whole instrument as a will is to disregard one of the distinctions on which this case turns. This unfortunate brevity also opens the door to misapprehension, for there may be a disposition to claim that because these remainders are mentioned in a "will," it follows that, in some way, they were a part of the estate of a deceased person. This was not the fact.

As a matter of convenience Mrs. Delano incorporated in the same instrument which also con-

tained her will certain provisions exercising these powers, and this was, no doubt, done because the deeds creating those powers had provided that the powers should be exercised by instruments *"exe-"cuted like* a will."

The clauses by which the powers were exercised could properly have been put in a separate instrument, and, if such an instrument had been executed before the requisite number of witnesses, it need not have been in the form of a will. It was an instrument by which a *third party* divided up the property of certain *other living* persons among themselves.

This property, that is, the remainders, had belonged in equal shares to all of the members of a certain class, but the original grantor had given Mrs. Delano power to take portions of the remainder from certain of the class and give it to certain others of the class.

It so happened that she herself had been given a life interest in the same lands and funds after which life interest these remainders were created, but the existence of that life estate in her does not make any difference so far as the legal questions affecting these remainders are concerned, and the same question would be presented if the life estate had been given to some other person and Mrs. Delano had been empowered to appoint the remainders after that life estate among a class. The remainder was no more hers in the present case than it would have been had she been given no life estate in the lands and funds, and those remainders no more passed under her "will" *as a will* in the present case than they would have passed had the life estate been given to some other person.

II.

THE LAW OF NEW YORK STATE, AS DECLARED BY CHANCELLOR WALWORTH IN 1845, CONTEMPORANEOUSLY WITH THE EXECUTION OF THESE DEEDS, WAS, THAT AN INSTRUMENT EXERCISING A POWER CREATED BY SUCH A SETTLEMENT IS NOT A WILL, AND DOES NOT OPERATE AS SUCH.

> ". . . . The testamentary instrument "which the wife executes, under a power of "appointment, either as to her real or per- "sonal estate, is not strictly a will, nor "does it operate as such in the proper legal "sense of the term. But it operates as an "appointment; and the devisee or legatee "takes the property by the force of the pow- "er." . . . .
>
> *Strong* v. *Wilkin*, 1 Barb. Chan., 9, 13.

The same principle has been recognized by decisions in Massachusetts, as for example, in *Heath* v. *Withington* (60 Mass., 497). There a marriage settlement had been made reserving to the wife a power to appoint "to such person or persons as she shall "in writing appoint to receive the same." She exercised that power by an instrument in the form of a will which was made at a time when the Massachusetts statute did not permit the making of a will by a married woman. The appointment was nevertheless held to be good, the Court, by Mr. Justice Metcalf, holding (p. 500):

> ". . . . the instrument before us is not "to have the effect of a will, but is an ap- "pointment in writing, to guide the conduct "of the trustee. Its effect, if proved and al- "lowed, is not that of a will in common cases. "The appointees will take, not as legatees of "Mrs. Heath, but as grantees or donees of the "trustee in whom the property was vested by "the indenture."

And again, in *Sewall* v. *Wilmer* (132 Mass., 131), where a testator domiciled in Massachusetts left real and personal property to trustees in trust for his daughter for life, and on her death to convey to such persons as the daughter should appoint,

> ". . . . by any deed or writing to be by "her signed, sealed and delivered in the pres- "ence of three or more credible witnesses, or "by her last will and testament in writing, or "by any writing purporting to be her last "will and testament, to be by her duly ex- "ecuted in the presence of a like number of "credible witnesses," . . . .

The daughter, whose domicile, at the time of her death, was Maryland, left an instrument which was proved as a will. It contained provisions which, under the law of Maryland, did not exercise the power, but which, under the law of Massachusetts, were legally sufficient to exercise the power. It was held that the power was properly exercised, although the instrument executed by the daughter was not valid as an exercise of the power in the State of the daughter's domicile. Mr. Justice Horace Gray (then Chief Justice of the Supreme Judicial Court of Massachusetts), in rendering the opinion, said:

> ". . . . But the property of which "Mrs. Wilmer (the daughter) has a power of "appointment is not her property, but the "property of her father; and the instrument "executed by her takes effect, not as a dispo- "sition of her own property, but as an ap- "pointment of property of her father under "the power conferred upon her by his "will." . . . .
>
> *Sewell* v. *Wilmer*, 132 Mass., 131, 136.

III.

THE POWERS CREATED BY THE DEEDS WERE GIVEN TO A MARRIED WOMAN.

The deed of 1844 was made by way of marriage settlement for Mrs. Delano (p. 89), and took effect only upon her marriage. The later deeds referred to her as having married (pp. 84, 87 and 93).

The powers of appointment given by those deeds were, therefore, given to a married woman.

If New York State had in 1844 and 1848 permitted married women to make wills, the instrument by which Mrs. Delano exercised these powers would still not have been a "will." But the fact that she *could not make a will* when these powers were created, and that eminent counsel prepared the deeds with this in mind emphasizes the fact that the instrument by which the powers were to be exercised, was not a will made by permission of the State, but an instrument of appointment made under the terms of the contract, that is, of the deed.

IV.

WHEN THE DEEDS OF 1844 AND 1848 WERE MADE A MARRIED WOMAN WAS NOT PERMITTED TO MAKE A WILL OF REAL OR PERSONAL PROPERTY.

As to real estate,

II New York Revised Statutes, 56, Sec., 1.

As to personal property,

II N. Y. Revised Statutes, 60, Sec. 21.

V.

THE DEEDS OF 1844, 1848 AND 1849 WERE EVIDENTLY PREPARED WITH CARE AND IN RECOGNITION OF THE NEW YORK REVISED STATUTES AND OF THE PRINCIPLE REFERRED TO IN THE CASES CITED, FOR NONE OF THE DEEDS REQUIRED THE POWER TO BE EXERCISED BY WILL.

The power created by the deed of 1844 is directed to be exercised "by instrument in its nature testamentary, to be acknowledged by her as a deed and in the presence of two witnesses or published by her as a will" (p. 91).

The power created by the deed of 1848 is directed to be exercised "by instrument in its nature testamentary to be acknowledged by her as a deed in the presence of two witnesses or published by her as a will" (p. 85).

The power created by the deed of 1849 is directed to be exercised "by any instrument executed duly as a will of personal estate" (p. 88).

In all of these cases the reference to a "will" is merely to indicate the manner in which the instrument of appointment is to be executed, and in two cases permission is given to exercise the power by deed. The directions go to the manner of execution and not the character of the instrument by which the power is to be exercised. They do not affect its essential character.

VI.

COULD MRS. DELANO HAVE EXERCISED THIS POWER BEFORE 1848?

The argument of this fifth point can be tested effectually by inquiring whether, in the years 1845, 1846 and 1847, before the Married Women's Acts of 1848 and 1849, which gave to married women the

power to make wills, were passed, Mrs. Delano could have exercised the power of appointment given her by the deed of 1844.

Could she, say in 1847, have exercised that power? She could certainly, in 1847, have made such an instrument of appointment as was required by the deed of 1844, that is, an "instrument in its nature testamentary (*i. e.*, an instrument to take effect on her death and revocable by her during life), to be acknowledged by her as a deed and in the presence of two witnesses or published by her as a will" (p. 91).

In making such an instrument she would not be making her "will," for she would not be devising or bequeathing property of which she was seized or possessed. But she would be acting as the agent of her father, William B. Astor, in reapportioning among a certain class of her relatives certain remainders which were not her property.

Just such a situation was presented to the Court in *Heath* v. *Withington* (60 Mass., 497), already referred to. There a power of appointment was exercised by a *married woman* by an instrument in the form of a will but made at a time when under State statutes married women were prohibited from making "wills," yet the Court held the appointment to be valid because the instrument of appointment was not a "will" in its legal effect.

It cannot be disputed that Mrs. Delano had, in 1847, the right to exercise the power of appointment. But where did she get that right? Not from the State, which forbade her making a will, but under the terms of a formal written contract between living persons, *i. e.*, the deed of 1844. And if she had, in 1847, that right under the terms of a contract, and if that right was to exercise the power as to all the remainder and not as to only 95 per cent. of it, then it follows that the right was hers

under contract in 1847 and cannot be impaired by subsequent statute.

The principle that a power of appointment is exercised (even when exercised by an instrument in the form of a will) under a contract right and not under a privilege granted by the State has been repeatedly stated in the series of Massachusetts cases on this subject. Thus, in *Parker* v. *Parker* (11 Cushing, 519, 522), the Court held of such an appointment:

> ". . . . It derives its efficacy wholly "from the authority to make the devise or "disposition of the estate conferred on the "married woman by some independent con- "tract or indenture, adapted to effect this "object. If no such authority is vested in "the wife, and it be the naked case of a mar- "ried woman making a will of her real es- "tate, the will is not authorized by "law," . . . .

And of such an appointment the Court again held, in *Ela* v. *Edwards* (16 Gray, 91, 100):

> ". . . . The authority to make such "disposition of her estate does not arise "under our statute of wills, but is the result "of articles of agreement entered into by the "parties before marriage."

VII.

THE ARGUMENT OF THIS FIFTH POINT CAN BE TESTED BY A RULE WHICH HAS BEEN LAID DOWN BY THE NEW YORK COURT OF APPEALS SINCE IT PASSED ON THIS CASE.

The Court of Appeals stated the grounds of its decision in this case as follows:

> "The statute, as we read it, does not at- "tempt to impose a tax upon property, but "upon the exercise of a power of appoint-

"ment (p. 131). . . . . The privilege "of making a will is not a natural or inher- "ent right, but one which the state can grant "or withhold in its discretion. If granted, it "may be upon such conditions and with such "limitations as the legislature sees fit to "create" (p. 132).

". . . . If the power had been exer- "cised by deed, a different question would "have arisen, but it was exercised by will "and owing to the full and complete "control by the legislature of the making, "the form and the substance of wills, it can "impose a charge or tax for doing anything "by will" (p. 133).

In a later transfer tax case (*Matter of Lansing*, 182 N. Y., 238) the Court of Appeals had again to consider this Amendment of 1897, and after discussing the nature of the transfer tax, stated "the "only theory on which the tax can be upheld," and then proceeded to apply an obvious test to discover whether, on the theory so announced, the tax could be imposed in that case.

The theory was stated and the test applied thus:

". . . . The theory of a transfer tax "is that it is a tax on the right accorded to "take under a will or to succeed in case of "intestacy which, it is said in the decisions, "are privileges that may be accorded or de- "nied by the state. (*Matter of Dows*, 167 "N. Y., 227; *Magoun* v. *Illinois Trust & Sav. "Bank*, 170 U. S., 283.) This is the only "theory on which the tax can be up- "held; for it is imposed upon United "States securities on which, of course, the "state cannot impose any property tax. Now, "suppose that the state at the time it im- "posed the inheritance tax instead of enact- "ing that statute had forbidden the making "of wills and succession in case of intestacy, "itself taking all the property that a dece- "dent might leave at the time of his death, "such a statute could have no possible effect

> "on Mrs. McVickar's [the appointee's] "rights, for those rights had been acquired "long before. Therefore, what privilege did "she get at that time from the State for "which it can charge or impose a tax?"
>
> *Matter of Lansing*, 182 N. Y., 238, 248.

Let us apply the same test to this case:

> "Suppose that the State at the time it im- "posed the inheritance tax instead of enact- "ing that statute had forbidden the making "of wills and succession in case of intestacy, "itself taking all the property that a dece- "dent might leave at the time of his "death, ..."

what effect would such a statute have had on the exercise of the powers created by these deeds? Obviously, no effect.

The powers were to be exercised by "instruments" executed as wills were executed or acknowledged as deeds. This merely regulated the manner by which the "instruments" were to be attested, but did not determine their nature. The decisions already referred to, particularly those of the Massachusetts courts, have so held.

Such instruments were made in fulfilment of an *agency*, and were not the deeds or wills of the donee of the power, for the reason that the donee of the power did not own the property to which they related. If, before Mrs. Delano's death, New York State had passed a statute repealing the Statute of Wills and the intestate laws, such a statute would not have affected these remainders, for Mrs. Delano never owned them.

More than this, the right of Mrs. Delano to exercise these powers and the right of the appellants to have them exercised "had been acquired long before." Therefore, what privilege did they get "at "that time from the State for which it can charge "or impose a tax?"

There was no real privilege of making a real will involved here, and when the New York Legislature passed the Statute of 1897 taxing appointments made by deeds *inter vivos* it diminished and impaired the contract rights which arose in 1844, 1848 and 1849, when these powers were created.

VIII.

THE ARGUMENT OF THIS FIFTH POINT CAN FURTHER BE TESTED BY CONSIDERING THE POWERS OF THE STATE WITH RESPECT TO THE DISPOSITION OF PRIVATE PROPERTY.

The State of New York not only *did not* give Mrs. Delano the privilege of exercising these powers by will, it *could not* give that privilege.

The reason why "the right accorded to take under "a will or to succeed in cases of intestacy . . . . "are privileges that may be accorded or denied by "the state" (*Matter of Lansing*, 182 N. Y., 238, 248) is because it is within the power of the State to decide what disposition shall be made of property in the State which is left without an owner because the former owner has died. This power of the State only arises where the *owner* of the property has *died*, and, therefore, to permit the State to interfere with the disposition of property two conditions must be met: (1) previous ownership, and, (2) death.

Neither condition was met in this case.

Mrs. Delano did not own these remainders. Her only relation to these remainders was that of an agent who was given certain powers over property not her own. The State can give to the owners of property in the State the privilege of making wills disposing of their property, but it cannot give them the privilege of making wills disposing of other people's property. It cannot give to an agent the privi-

lege of disposing by will of the property of his principal.

These propositions are simple and self-evident, and from them it follows that the State of New York had no more power to give Mrs. Delano the privilege of *making a will* disposing of these remainders than it had to give such a privilege to a total stranger.

The owners of the remainders (that is, the remaindermen designated by the deeds) had not died. The power which the State has over the property of a deceased person has never been called into being so far as these remainders are concerned, and the State therefore cannot give the privilege of disposing of such property by *will*.

The only way in which Mrs. Delano could have obtained the power to appoint these remainders was by contract, for the State *could not* give her that power.

It is making a self-evident statement to say that a State cannot give to one citizen the privilege of disposing by will of the property of another citizen. The moment, therefore, it is recognized that these remainders were not the property of Mrs. Delano, it must also be recognized that in appointing the remainders she cannot have exercised a privilege given to her by the State, for the State has no power to give to one person such a privilege with respect to the property of another.

If the powers had been created by *will*, and if a succession tax had been legally imposed on the transfer caused by that will, an entirely different case would have been presented. The exercise of the powers would then be legally a part of the will, and, so, legally a part of the original privilege. And the State could revoke that privilege in part or impose a charge in return for that privilege, and it could do this when the original will took effect or

when the instrument exercising the power took effect.

SIXTH POINT.

The imposition of a tax under the Amendment of 1897 will deprive the plaintiffs in error of property without due process of law.

I.

THE LEGISLATURE HAS BASED THIS EXACTION ON AN HYPOTHESIS AS TO THE FACTS, WHICH IT DELIBERATELY RECOGNIZES TO BE A FALSE HYPOTHESIS.

As already discussed (Third Point), the New York Court of Appeals has held that, in passing the Transfer Tax Act and its amendments, the New York Legislature did not exercise the general taxing power of the State, but intended to pass a succession tax.

In this case there has been no succession, and there can be no succession tax here unless it is within the power of the Legislature to avoid constitutional limitations by "deeming" the facts to be what they are not.

The Legislature in framing the Amendment of 1897 adopted phraseology broad enough to include the case of powers created by *deed*. The framers of the act accordingly recognized that when applied to appointments under powers created by deed the act would reach cases where there was not, in fact, any succession, and to meet such cases —and this is one of them—the Legislature provided that—

"whenever any person or corporation "shall exercise a power of appointment de- "rived from any disposition of property "made either before or after the passage of "this act, such appointment when made "*shall be deemed* a transfer taxable under "the provisions of this act in the same man- "ner *as though* the property to which such "appointment relates *belonged absolutely* to "the donee of such power and had been *be- "queathed or devised* by such donee by "*will.*"

The words "a transfer taxable under the provisions of this Act" are defined by the section in the same statute relating to definitions (Chap. 908, Laws of 1896, Secs. 220 and 242) as meaning dispositions by will, by the intestate laws, or by deed or gift, to take effect on the death of the grantor. All of such transfers are in fact successions; that is, they depend on the *death* of the previous *owner* of the property.

But when applied to this case, where the power has been created by deed *inter viros,* and taking effect on delivery and not on the death of the grantor, the statute ignores the facts at every important point. It provides that the exercise of the power

(*a*) *"shall be deemed"* a succession caused by *death,* although that is not the fact;

(*b*) *"as though* the property to which "such appointment relates belonged abso- "lutely to the donee of such power," although it did not belong to the donee;

(*c*) "and had been bequeathed or devised "by such donee by will," although it had not been bequeathed or devised by the donee, and although the instrument by which the power is exercised, in so far as it does exercise the power, is not a will.

States have repeatedly attempted to treat an appointment as a succession for the purpose of collecting a succession tax, but such attempts have uniformly failed for the reason that an appointment is not legally a succession because the appointed property does not belong to the donee of the power.

A leading decision on this subject, and one which was based on the same principles which have here been discussed, is *Emmons* v. *Shaw,* 171 Mass., 410. And to the same effect are:

Commonwealth v. *Duffield,* 12 Penn. St., 277.

Commonwealth v. *Williams,* 13 Penn. St., 29.

Matter of Stewart, 131 N. Y., 274, 281.

Matter of Harbeck, 161 N. Y., 211.

By the Amendment of 1897 the New York Legislature attempted to change the law on this subject by expressly imposing a succession tax at the time when a power of appointment should be exercised. This it had power to do where there had *in fact* been a succession; that is, where the power had been *created* by *will,* or by deed taking effect at death, and the power had thus arisen on the *death* of the former *owner,* for, so long as the property was going through the legal machinery of succession set in motion by the death of the owner, a succession tax could at any time be imposed (*Orr* v. *Gilman,* 183 U. S., 278).

But here, where there had not in fact been any succession, the Legislature sought to meet that fundamental difficulty by enacting that *the facts* should "be deemed" to be what they were not, and this for the purpose of avoiding constitutional limitations on the legislative power to take private property.

This is not a case where facts have arisen in the course of applying a statute which may not have been in the mind of the Legislature when the statute was passed. In passing the Amendment of 1897 the Legislature distinctly recognized that it was imposing a tax by means of a hypothesis, and it distinctly recognized that the hypothesis was false. For, when it provided that an appointment should be deemed a transfer under the provisions of the act,

> "in the same manner as though the prop-
> "erty to which such appointment relates be-
> "longed absolutely to the donee of such
> "power and had been bequeathed or devised
> "by such donee by will,"

it recognized that the property did not belong to the donee and that the donee had not bequeathed or devised it by will.

This case, therefore, raises directly the question, whether a Legislature may *deliberately* take the property of a citizen by means of a statute which requires that the facts be considered to be what they are not, and which requires the property to be treated as belonging to a person who does not own it.

This method of legislating by means of an hypothesis recognized to be false would afford an easy method of evading any of the provisions of the United States Constitution.

For example, if a State should now pass a law making rebating a felony, and should provide that such law *"shall be deemed"* to have been passed in the year 1850 and shall apply to all cases and be in force *"in the same manner as though"* it had become a law in 1850, would such a device deprive citizens of the protection of the provision of the Constitution prohibiting an *ex post facto* law?

In fact, what security can ever be afforded to a

citizen by the United States Constitution if it is due process of law for a State Legislature to enact that the fact *"shall be deemed"* to be what it is not and then to legislate against the citizen "in the same manner as though" the fact was what it is not?

It can hardly be necessary to argue against the illegality of such a device for evading the Constitution, for if the device is legal it would require but little ingenuity in the use of false hypothesis to evade almost any of the provisions of the Constitution which limit legislative power. The Constitution could then be nullified by State Legislatures at will.

The difficulty which the New York Legislature here sought to overcome was, that Mrs. Delano did not own the property which she appointed under the power, and as the power had been brought into effect by the delivery of a deed and not by the death of an owner, the State had no jurisdiction to impose a succession tax. And this difficulty it sought to overcome by declaring that the appointment should be taxed as though the property belonged to Mrs. Delano.

Such a device for evading constitutional provisions has been expressly condemned by this Court. In *St. Louis* v. *Ferry Co.* (11 Wall., 423, 430), Mr. Justice Swayne, in stating the opinion of the Court, held, in language which was afterward quoted with approval by Mr. Justice Field in stating the opinion of the Court in *Gloucester Ferry Co.* v. *Pennsylvania* (114 U. S., 196, 208):

> "Where there is jurisdiction neither as to "person nor property, the imposition of a tax "would be *ultra vires* and void. If the Legis- "lature of a State should enact that the citi- "zens or property of another State or coun- "try should be taxed in the same manner as "the persons and property within its own

"limits and subject to its authority, or in "any other manner whatsoever, such a law "would be as much a nullity as if in conflict "with the most explicit constitutional in- "hibition. Jurisdiction is as necessary to a "valid Legislature as to a valid judicial "action."

II.

THIS EXACTION IS BASED ON A LEGISLATIVE TRANSFER OF THESE REMAINDERS FROM THE TRUE OWNER TO ONE WHO WAS NOT THE OWNER.

This exaction has been made by the State of New York by first making these remainders the property of Mrs. Delano and then by proceeding to take five per cent. of them, as though they were her property, and this preliminary transfer of the remainders from the true owners to Mrs. Delano, who was not the owner, has been effected by means of a legislative enactment.

But the *Legislature* has no jurisdiction by which it can decide that property shall be treated as though it belonged to one who does not own it, and, if it had, the parties in interest have had no notice or opportunity to be heard prior to such decree. Where there is due process of law there must be jurisdiction, notice and an opportunity to be heard.

Pennoyer v. *Neff*, 95 U. S., 714, 733.
Scott v. *McNeal*, 154 U. S., 34, 46.

Mr. Justice Field, in a dissenting opinion, in a case in which Mr. Justice Strong and Mr. Justice Bradley also dissented, has discussed the circumstances under which an act of the Legislature became really a judicial act.

". . . . Wherever an act undertakes "to determine a question of right or obliga- "tion, or of property, as the foundation upon

"which it proceeds, such act is to that extent "a judicial one, and not the proper exercise "of legislative functions." . . . .

Sinking Fund Cases (*Union Pacific R. R.* v. *U. S.*), 99 U. S., 700, 761.

The parties here in interest had no day in court or hearing when this property of theirs was declared by the Legislature to be the property of Mrs. Delano as a preliminary step to an exaction which should deplete it.

Of such an act Mr. Justice Story said, in *Wilkinson* v. *Leland*, 2 Peters, 627, 658:

". . . . We know of no case, in which "a legislative act to transfer the property of "A to B without his consent, has ever been "held a constitutional exercise of legislative "power in any state in the Union. On the "contrary, it has been consistently resisted "as inconsistent with just principles, by "every judicial tribunal in which it has been "attempted to be enforced." . . .

SEVENTH POINT.

The Amendment of 1897 in imposing a succession tax on the property of the plaintiffs in error impaired the obligation of a contract.

The claims made under this point will be found to be distinct from those which have been urged above with respect to constitutional limitations on the taxing power. The plaintiffs in error here rely on Section 10 of Article I of the Constitution, which prohibits the States, by the exercise of any or all of their powers, from impairing the obligation of a contract.

In many of the cases which have come before this Court under the clause of the Constitution prohibiting a State from passing a law impairing the obligation of contracts, one of the main questions has been as to the existence of anything which could legally be called a contract. No such complication exists here. The plaintiffs in error point to the definite provisions of deeds executed by their ancestor for their benefit forty years before there was any succession tax in New York, and they ask that the State shall not be allowed to alter the terms of those contracts.

I.

Status of the plaintiffs in error as declared by the New York courts.

Each of the remaindermen named in the original deeds took a vested remainder subject to being divested only by the exercise of the power in favor of some other member of the class.

> ". . . . It appears to be well settled, "that until the execution of the "power, the remainders or limitations "over take effect the same as if "no such power existed, or as in the case "of default of execution of it. Cunningham "*v.* Moody, 1 Vesey Sen., 174; Doe *v.* Mar-"tin, 4 T. R., 39; Fearne, 227 to 232; Sugden "on Powers, 2, 5. The doctrine is very "clearly and succinctly stated by Fearne; "and Sugden, after discussing the cases on "the point, observes that the result of the "authorities is, that the power of appoint-"ment does not prevent the vesting of the "estates limited in default of appointment. "They are, of course subject to be divested "on the execution of the power."
>
> *Root* v. *Stuyvesant,* 18 Wend., 257, 267.

A transfer tax cannot constitutionally be imposed on a remainder which vested before the tax was created.

Matter of Pell, 171 N. Y., 48, 55.
Matter of Lansing, 182 N. Y., 238, 247 and 248.

The fact that the interests of any of the remaindermen under the deeds of 1844, 1848 and 1849 could be divested does not deprive them of constitutional protection. As the New York Court of Appeals said in an appointment case under the Amendment of 1897,

> ". . . . the interests of the devisee accrued on the death of the testator, and at that instant, and were immune from legislative attack whether contingent or vested." . . . .
>
> *Matter of Vanderbilt*, 172 N. Y., 69, 73.

II.

TO IMPOSE A TAX UNDER THE AMENDMENT OF 1897 WILL IMPAIR THE CONTRACTS CONTAINED IN THE DEEDS TO THE DETRIMENT OF ALL OF THOSE WHO TAKE ANY POWER OR ESTATE UNDER THOSE DEEDS.

(*a*) The Donee of the Power.

Under the deeds, Mrs. Delano had the power to appoint the entire remainder. The Amendment of 1897 changes this and gives her power to dispose of only 95 per cent. of the remainder, giving the other 5 per cent. to the State. This is simply the impairment of a contract.

If the State were here taxing property merely as property and by means of a property tax, a different question would be presented,

and even then the tax could not possibly be on Mrs. Delano or on her property, for it was not imposed till *after her death.*

Or if the State were here taxing a person a different question would be presented, and, even then, the tax could not possibly be on Mrs. Delano for it was not imposed till *after her death.*

But this is not a tax either on property or on a person, but a tax "on the transaction" or "transmission" (*Knowlton* v. *Moore,* 178 U. S., 41, 56); that is, a diminishing of the right of succession; (*U. S.* v. *Perkins,* 163 U. S., 625, 628), although there has in fact been no succession (that is, no change of ownership caused by death which could afford any legal basis for such an exaction). The State has merely attempted to take away the power to appoint 5 per cent. of these remainders, and to that extent has sought to impair these powers created more than half a century ago.

It does not answer this contention to say, that after these deeds were made New York State gave to Mrs. Delano the power to make a will. As already argued, the instrument by which she executed the powers was not legally a will. And if it had been *the State could not give her the power to dispose of these remainders by will because the remainders were not her property,* and it is obviously beyond the power of the State to give to any person the power to dispose by will of the property of others.

More than this, the State did not give a privilege in this case, for Mrs. Delano *already had* the power of appointment by deed without resorting to any permission by the State, and that fact made it unnecessary to inquire what powers any subsequent statutes gave or withheld. A statute which should give to a citizen a right of way across his own land would not affect his rights, for he would already have a right of way irrespective of any gift or privi-

lege from the State, and the pretended giving of such a "privilege" would not justify the State in thereafter treating the right of way of a citizen over his own land as a privilege.

The State of New York in this case did not give a privilege, and there is therefore no privilege which it can legally take back in whole or in part.

(*b*) The Whole Body of Remaindermen Designated by the Deeds.

Each of these original remaindermen took under the deeds a vested estate in his share of the remainder. That estate could only be divested on one contingency, and that is, by the exercise of the power in such a way as to exclude him.

The Amendment of 1897 in this case has impaired this contract right by making this vested estate subject to being divested in another way to the extent of 5 per cent., that is, by the taking of that 5 per cent. by the State.

Here again it is important to observe that this exaction of the State is not a tax on the appointee, for if the appointee were the United States of America the exaction would still be allowed (*United States* v. *Perkins,* 168 U. S., 625), although the State of New York has no power to tax the United States. And it is not a tax on the property appointed, for, if the property appointed had consisted of United States bonds, the exaction would still be allowed (*Plummer* v. *Coler,* 178 U. S., 115), although the State of New York has no power to tax United States bonds.

It is an exaction "on the transaction," and is a part of the transaction, and it alters the transaction in that the right of these original remaindermen is impaired to the extent of 5 per cent. If the transaction were not altered, the State could collect nothing here, for there is no tax on

either persons or on property, and it is only by altering the transaction and diverting the 5 per cent. into its own treasury that the State gets anything.

(*c*) The Appointees.

The appointees, as members of the general class of remaindermen designated by the original deeds, each took an aliquot part of the remainder under those original deeds. The title of each of them to such aliquot part has remained undisturbed from the time when it originally vested in them down to this day, and the exercise of the power of appointment had no effect whatever with respect to that part.

With respect to the other part of the remainder, each appointee when chosen by the donee of the power was entitled to have the power exercised in his favor in full. The Amendment of 1897 has prevented this, for it has altered the power so that it could only be exercised as to 95 per cent. of the property.

III.

THE APPLICATION OF THE UNITED STATES CONSTITUTION.

The clause of the United States Constitution providing that no State shall pass a law impairing the obligation of contracts applies to grants and other executed contracts, as well as to executory contracts.

Fletcher v. *Peck*, 6 Cranch, 87, 136

Even where the State has the power to tax, that does not give it the power to alter a contract.

". . . . *no State, by virtue of its taxing power, can say to a debtor, 'You need*

> *"'not pay to your creditor all of what you "'have promised to him. You may satisfy "'your duty to him by retaining a part for "'yourself, or for some municipality, or for "'the State Treasury.' . . . ."*
>
> *Murray* v. *Charleston,* 96 U. S., 432, 444.

> ". . . . What the legislature cannot "do directly, it cannot do indirectly, as the "Constitution guards as effectually against "insidious approaches as an open and direct "attack. Whenever a law deprives the "owner of the beneficial use and free enjoy- "ment of his property, or imposes restraints "upon such use and enjoyment, that ma- "terially affect its value, without legal "process or compensation, it deprives him of "his property within the meaning of the "Constitution." . . . .
>
> *Forster* v. *Scott,* 136 N. Y., 577, 584.

With respect to the character of the rights created by such deeds as these, and their immunity from legislative attack, it was held in New York in 1849, with respect to a trust deed made in 1846:

> ". . . . The plaintiff's grant to the "trustee is a contract, and even the possibili- "ties created by it, are perfect rights of prop- "erty, held under an executed contract. A "statute impairing this grant would be void, "by the provision in the constitution of the "United States against enactments by the "states impairing the obligation of con- "tracts."
>
> *Watson* v. *Bonney,* 2 Sandf., 405, 416.

Here again it is necessary to bear in mind that this exaction is not the imposition of a tax on persons or on property, but is the withholding by the State of five per cent. of property which would

otherwise have been appointed by Mrs. Delano among her heirs, and which the appointees would otherwise have been entitled to receive by the appointment; that is, it is an impairment to the extent of five per cent. of the contract rights created by the deeds made by William B. Astor.

The State of New York can undoubtedly tax the appointees as individuals if they are within its taxing jurisdiction and can tax their property as property, if that is within its jurisdiction, but it cannot impair a contract made with reference to that property half a century before the Amendment of 1897 was passed.

In the *Foreign-Held Bond Cases* this Court held, Mr. Justice Field writing the opinion of the Court:

> ". . . . The law which requires the "treasurer of the company to retain five per "cent. of the interest due to the non-resident "bondholder is not, therefore, a legiti- "mate exercise of the taxing power. It "is a law which interferes between the "company and the bondholder, and under "the pretense of levying a tax com- "mands the company to withhold a por- "tion of the stipulated interest and pay "it over to the State. It is a law which im- "pairs the obligation of the contract between "the parties. The obligation of a contract "depends upon its terms and the means "which the law in existence at the time af- "fords for its enforcement. A law which "alters the terms of a contract by imposing "new conditions, or dispensing with those "expressed, is a law which impairs its obli- "gation, for, as stated on another occasion, "such a law relieves the parties from the "moral duty of performing the original stip- "ulations of the contract, and it prevents "their legal enforcement." . . . .
>
> *State Tax on Foreign-Held Bonds*, 15 Wall., 300, 320.

Certain changes in the law as to the *situs* of personal property have occurred since the *Foreign-Held Bonds* case was decided, but those changes do not affect the decision of the Court on the inviolability of contracts.

The appointees in this case are not reached by this succession tax any more than the non-resident bondholders were reached by the tax in the case just cited. For, as has repeatedly been held, this tax is not imposed on them (*U. S.* v. *Perkins*, 163 U. S., 625), nor on their property. (*Plummer* v. *Coler*, 178 U. S., 115.)

In this case, just as in the Foreign-Held Bonds Case, a State statute which could not impose a tax on the person, attempted, nevertheless, to collect money for the State by interfering with the obligation by which property was to be transferred and the statute sought to do this by requiring a person, through whose hands the property passed, to take out five per cent. and turn it over to the State.

A part of the property originally transferred by the Deed of 1844 and all of the property originally transferred by the Deed of 1849 consisted of personal property. This was in the hands of Trustees during Mrs. Delano's lifetime and remained in their hands after her death. If, after her death, the appointees of the property had brought action against the Trustees to recover it, what defense could the Trustees have offered for turning over only ninety-five per cent. of the property instead of one hundred per cent.?

Obviously, the only defense they could have offered would have been to say, that by the Amendment of 1897 the Legislature had enacted that they need not pay over to the appointee all that the original deed required to be paid to him, but might satisfy their duty toward him by retaining a part for the State Treasury.

But how could such a power be claimed for a

State statute when this Court has expressly held that—

> ". . . . no State, by virtue of its taxing "power, can say to a debtor, 'You need not "'pay to your creditor all of what you have "'promised to him. You may satisfy your "'duty to him by retaining a part for your-"'self, or for some municipality, or for the "'State treasury.' . . . ."
>
> *Murray* v. *Charleston*, 96 U. S., 432, 444.

> "As the States are forbidden to pass any "laws impairing the obligation of contracts, "they are of course precluded from levying "any taxes which would have that effect."
>
> Cooley on Constitutional Limitations, 5th Ed., page 603.

This is not a case of the exercise of the State's general power of taxation, but if it were the State could not impair the obligation of a contract by a taxing statute (*State Bank of Ohio* v. *Knoop*, 16 How., 369) or even by a Constitution (*Dodge* v. *Woolsey*, 18 How., 331).

These plaintiffs in error do not claim that they, as individuals, or their properties as property, enjoy any exemption from taxation, but they claim that where no tax has been imposed either on them or on their property, contracts for their benefit shall not be impaired to obtain funds for public purposes.

If these powers had been created by will or by deed to take effect on the death of the grantor, then the whole contract would have depended on the *privilege* of succession granted by the State and would have been subject to any curtailment of that privilege by the State, or the imposition of any condition on the privilege by the State.

IV.

THIS COURT HAS DECIDED THAT SUCH CONTRACTS AS ARE HERE RELIED UPON BY THE PLAINTIFFS IN ERROR ARE PROTECTED AGAINST IMPAIRMENT BY THE UNITED STATES CONSTITUTION.

The essence of the decision in the Dartmouth College case (*Dartmouth College* v. *Woodward*, 4 Wheaton, 518) was, that a State Legislature could not impair *powers* given to Trustees of a college under its original charter. Much of the argument in that case was directed to the questions whether the original charter of Dartmouth College was such a contract as was protected by this clause of the Constitution, and whether the Trustees had such a *beneficial* interest in the maintenance of their powers as brought them within that constitutional protection.

Mr. Chief Justice Marshall, in discussing the contracts which were protected by this clause, found many reasons for extending that protection to such a grant of powers, as when he said (pp. 644-5):

> ". . . . The case being within the "words of the rule, must be within its opera- "tion likewise, unless there be something in "the literal construction so obviously ab- "surd, or mischievous, or repugnant to the "general spirit of the instrument, as to "justify those who expound the constitution "in making it an exception.
>
> "On what safe and intelligible ground can "this exception stand. There is no expres- "sion in the constitution, no sentiment de- "livered by its contemporaneous expound- "ers, which would justify us in making it. In "the absence of all authority of this kind, is "there, in the nature and reason of the case "itself, that which would sustain a construc- "tion of the constitution, not warranted by "its words? Are contracts of this descrip- "tion of a character to excite so little inter- "est, that we must exclude them from the

"provisions of the constitution, as being un-
"worthy of the attention of those who
"framed the instrument? Or does public
"policy so imperiously demand their re-
"maining exposed to legislative alteration,
"as to compel us, or rather permit us to say,
"that these words, which were introduced to
"give stability to contracts, and which in
"their plain import comprehend this con-
"tract, must yet be so construed, as to ex-
"clude it?"

Mr. Justice Story, in his opinion discussed the same subject at length and reached the same conclusion. He said (p. 697):

"In respect also to grants and contracts, it
"would be far too narrow a construction of
"the constitution, to limit the prohibitory
"clause to such only where the parties take
"for their own private benefit. A grant to a
"private trustee for the benefit of a particu-
"lar *cestui que trust*, or for any special, pri-
"vate or public charity, cannot be the less
"a contract because the trustee takes noth-
"ing for his own benefit." . . . .

And, in defining the scope of this clause of the Constitution, he proceeded *to refer to precisely such deeds of settlement as were made by William B. Astor, and held that such were protected by this clause of the Constitution* (pp. 698-699, 700):

"Another objection growing out of, and
"connected with that which we have been
"considering, is, that no grants are within
"the constitutional prohibition, except such
"as respect *property* in the strict sense of
"the term; that is to say, beneficial interests
"in lands, tenements, and hereditaments, &c.,
"&c., which may be sold by the grantees for
"their own benefit: and that grants of fran-
"chises, immunities, and authorities not val-
"uable to the parties, *as property*, are ex-
"cluded from its purview. No authority has
"been cited to sustain this distinction, and

"no reason is perceived to justify its adop-
"tion. There are many rights, franchises, and
"authorities which are valuable in contem-
"plation of law, where no beneficial interest
"can accrue to the possessor. A grant of the
"next presentation to a church, limited to
"the grantee alone, has been already men-
"tioned. *A power of appointment, reserved*
"in a marriage settlement, either to a party
"or a stranger, to appoint uses in favour of
"third persons, without compensation, is an-
"other instance. [Our italics.]" . . . .
"The truth, however, is, that all incorporeal
"hereditaments, whether they be immunities,
"dignities, offices, or franchises, or other
"rights, are deemed valuable in law. The
"owners have a legal estate and property in
"them, and legal remedies to support and re-
"cover them, in case of any injury, obstruc-
"tion or disseizin of them. Whenever they
"are the subjects of a contract or grant, they
"are just as much within the reach of the
"constitution as any other grant. Nor is
"there any solid reason why a contract for
"the exercise of a mere authority should not
"be just as much guarded as a contract for
"the use and dominion of property." . . . .

This is a direct expression of the opinion of this Court on the precise contract on which these plaintiffs in error rely.

Consider, again, the effect of the Amendment of 1897 on the rights of Mrs. Delano under the deeds. By no device of argument is it possible to maintain that the Amendment of 1897 imposed any tax *on Mrs. Delano* or on *her property*, for the Amendment did not purport to impose any tax until after her death. But the amendment did impair her power, for it only permitted her to appoint ninety-five per cent. of the remainder instead of one hundred per cent. This is a simple and clear case of impairment of contract in the primary significance of the word "impairment" and of the word "contract."

What case could call more strongly for the application of the words of Chief Justice Marshall, quoted above: "Is there in the nature and reason of the "case itself that which would sustain a construction "of the constitution not warranted by its words?"

There was enough doubt about the existence of a contract in the Dartmouth College case to lead to long argument, but there can be no doubt here as to the existence of a contract or as to its terms, and if the opinions filed in the Dartmouth College case are studied with the facts of this case in mind, it will be seen that the whole purpose of that decision was to protect contracts of this character.

The plaintiffs in error in relying on the Dartmouth College case can refer not only to the phraseology of the opinions where such contracts as these were expressly held to be protected, but also to the whole purpose of the decision, which was to protect against impairment powers which involved little, if any, benefit to the donees.

The statutes which have been passed in most of the States affecting the property rights of married women have done away with the necessity for marriage settlements in most cases, but when these deeds were made in the forties and when the Dartmouth College case was decided twenty-five years earlier, such settlements must have been common. So, it was quite natural that Mr. Justice Story should refer to the power of appointment conferred by such settlements as one of those contracts protected by this clause of the Constitution, and *it was equally to be expected that when William B. Astor made these deeds he should have relied upon the law as so declared.*

It does not answer this argument to claim that the State was here exercising its power to tax, for it has been specifically held in this case that the State was not exercising its general taxing power,

but was imposing a succession tax; that is, that it was altering the statutes relating to the succession to property (*United States* v. *Perkins*, 163 U. S., 625, 628) by appropriating a part of the property to the State's use, or by imposing a charge upon it as a condition to availing of the privilege granted by those statutes. This was not an exercise of the State's power to tax, but it was an exercise of the State's power to regulate succession, and, as has been repeatedly held in this Court and the New York Court of Appeals, the legality of such exactions is not to be tested by the principles regulating the power to tax, but by the principles governing the power to regulate succession.

If William B. Astor had created these powers by his will (or by deed *to take effect at his death*, which would legally have been the same thing. (*Minot* v. *Winthrop*, 162 Mass., 113), he would have subjected this property to the power of the State with respect to the making of wills and with respect to succession under wills, and if he had so subjected it to that power, then a succession tax could have been imposed at any point of the administration while the property was passing through the legal machinery so provided by the State.

But William B. Astor did not subject this property to that power of the State and he did not invoke that power for the purpose of transferring the property. He granted these remainders by deed taking effect on delivery, and if the State is now allowed, by a statute passed in 1897, to make a disposition of five per cent. of the property different from that disposition which was made by the grantor, then the contract evidenced by those deeds has been impaired.

It cannot be necessary to argue the proposition that all persons interested, or who may become interested, in the contracts contained in the deeds of

1844, 1848 and 1849 may invoke the protection of the Constitution against any impairment of those contracts. If this were not so, that inviolable quality which is given to contracts by the United States Constitution and which has contributed so greatly to the stability of our institutions, would die with the original parties to the contract.

EIGHTH POINT.

The Court of Appeals erred in holding that the Amendment of 1897 did not violate the Constitution of the United States.

This litigation has, from its inception, been based on the rights under the United States Constitution which the plaintiffs in error now assert. The Federal questions now raised were raised when testimony was first offered by the State before the tax appraiser (pp. 51, 71 and 72), then on appeal to the Surrogate (pp. 39 and 44), then on appeal to the Appellate Division (p. 4), then on appeal to the Court of Appeals (p. 108), and now in the assignments of error relied upon (pp. 113-119).

The Appellate Division considered and decided the case on constitutional grounds (pp. 137-140), and the Court of Appeals prefaced its opinion by the statement:

> "This appeal presents the question "whether the legislature is prohibited by "the Constitution, State or Federal, from "passing an act to impose a transfer tax "upon the exercise, by a last will and testa-"ment, of a power of appointment derived

> "from a deed, executed before the passage of "any statute imposing a tax upon the right "of succession to the property of a decedent" (p. 130).

Much might be said against the justice of diminishing by this exaction a gift to descendants which was made by deed more than half a century before the Amendment of 1897 was enacted, but that is a legislative question which the plaintiffs in error do not seek to discuss here. They have, throughout this case, pointed to definite and formal written contracts made by their ancestor for their benefit and they invoke specific constitutional guarantees to the citizen. They have consistently and insistently throughout this litigation rested their case on those constitutional guarantees.

When Mr. Carey made his application to have the proceeding to assess the tax dismissed as to him, the Surrogate, on learning that constitutional questions were involved, rendered a *pro forma* decision sustaining the tax, leaving the constitutional questions for the Appellate tribunals.

The five justices of the Appellate Division decided unanimously in favor of the points now urged by the plaintiffs in error (pp. 135-140). That Court briefly sums up its decision thus:

> "Having in mind, therefore, the fact that "the relator obtained his property rights by "deed and not by will and at a time when "there was no transfer tax or inheritance "tax law in existence and that he does not "obtain his estate by right of succession "under the will of Laura Astor Delano but "acquires it under the deeds of William B. "Astor which were in no sense testamentary "in character but were made many years "before the grantor's death, it follows, we "think, that the attempt of the legislature "to tax such property rights cannot succeed "and for the reasons that we have briefly "outlined, namely, that to uphold the tax

"here sought to be imposed under the guise "of taxing a right of succession, would in "fact be to sanction a tax upon property "and for that purpose to give to the amend- "ment of 1897 a retroactive effect which "would be violative of the Constitution" (p. 139).

In the Court of Appeals, the decision was rendered by a divided Court, two of the justices agreeing with the Appellate Division, and five deciding that a tax had been legally imposed.

In the Court of Appeals this case has necessarily turned on the interpretation of a particular State statute, the Amendment of 1897. Without that statute this exaction could not have been sanctioned, for that Court, in a decision announced shortly before the Amendment of 1897 took effect, held that no transfer tax had been imposed on appointments (*Matter of Harbeck*, 161 N. Y., 211).

In considering this case the Court of Appeals relied, therefore, on the provisions of the Amendment of 1897, not only for their conclusion, but for the method by which that conclusion was reached. They interpreted the statute as they discussed the case, and the discussion and interpretation are so interwoven as not to be separable. This is important, because that interpretation is not open to question here and the plaintiffs in error can now properly ask this Court to apply to the whole discussion and interpretation below the constitutional provisions which are invoked.

The basis of the opinion of the majority of the justices is shown by the following extracts from their opinion, and the expressions of opinion so quoted invite the comments which follow them.

I.

". . . . He [the appointee] is com-
"pelled to resort to the will in order to estab-
"lish his right, for the deed alone will not
"suffice. The privilege of making a will is
"not a natural or inherent right, but one
"which the state can grant or withhold in
"its discretion. If granted, it may be upon
"such conditions and with such limitations
"as the legislature sees fit to create" . . . .
(pp. 131-132).

The statement above quoted is the essence of the Court's decision. It is based on two propositions (the negative of which has been discussed in Points 5 and 7 above), viz.:

FIRST.—That in exercising these powers created by deed Mrs. Delano was making a "will" and

SECOND.—That in so exercising the powers she relied on a "privilege" granted by the State.

This privilege theory had not been discussed by counsel because the important deeds were made when New York State forbade the making of wills by a married woman. That fact was accordingly brought to the attention of the Court of Appeals by means of a motion for reargument, but the motion was denied (177 N. Y., 540).

II.

As a necessary corollary to the words last quoted from its opinion, the Court of Appeals went on to hold:

". . . . The legislature could provide
"that no power of appointment should be ex-
"ercised by will, or that it should be exer-
"cised only upon the payment of a gross or
"ratable sum for the privilege. It could
"exact this condition, independent of the

"date or origin of the power. All this neces-
"sarily flows from the absolute control by
"the legislature of the right to make a will"
(p. 132).

This is another way of saying that the Legislature could in 1897 legally expunge from the deeds made in 1844, 1848 and 1849 the provisions as to the power of appointment and could do this to the detriment of all who took any power or estate under those deeds. Is it then possible to say that the obligation of that contract has not been impaired?

And the decision cannot be upheld by relying on the general power of the State to tax, for the Court of Appeals held here, as it had held before, that the Legislature was not exercising the general taxing power of the State, but was imposing a succession tax.

It necessarily follows from the decision below that "the legislature could provide that no power "of appointment should be exercised by will," and those words used by the Court of Appeals *in this case* mean that the Court there intended to hold that the Legislature had power to prohibit altogether the exercise of the power created *by these deeds.*

How can that conclusion of the Court of Appeals possibly accord with the whole principle of the decision in the *Dartmouth College Case,* and particularly with the opinion of Mr. Justice Story, when he *picked out the powers given by marriage settlement deeds as example of powers which a State statute could not impair.*

III.

In answer to the objection to taxation by false hypothesis, the Court of Appeals said:

> ". . . . The statute applies to all "powers alike, without distinction on ac- "count of the method of creation or the date "of creation, and provides that the exercise "of the power shall be deemed a taxable "transfer of the property affected, the same "as if it had belonged absolutely to the donee "of the power and had been bequeathed or "devised by such donee" . . . . (p. 133).

This decision sustains, in the case of powers created by deed, the action of the Legislature in passing the Amendment of 1897 and holds that where powers of appointment have been created by deed *inter vivos* a State may take the property appointed under such powers by *deeming* the transfer to be one caused by death *as though* the property had belonged to one to whom it did not in fact belong.

But, obviously, this Court in enforcing the constitutional safeguards of the citizens must consider the facts and not some hypothesis, and particularly not an hypothesis which is recognized to be false. The ascertainment of facts is a judicial function which involves a hearing of the parties in interest. Here the Legislature proceeded without notice or hearing to decide that these remainders should be the property of a person who did not own them and on that foundation it has based this exaction.

NINTH POINT.

It should be held that by reason of the provisions of the Constitution of the United States no tax can be imposed or collected under Chapter 284 of the Laws of 1897 of the State of New York on any appointment made to any of the plaintiffs in error under powers created by deed, and the cause should be remanded to the Surrogate's Court of New York County for further proceedings in accordance with such determination.

LUCIUS H. BEERS,
Counsel for Plaintiffs in Error.